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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-735

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner,*

v.

DOW CHEMICAL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner,*

v.

DOW CHEMICAL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, International Union of Electrical, Radio and Machine Workers, AFL-CIO,[1] respectively prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals in Case No.

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[1] Hereafter referred to as "Union."

72-1369 and styled Dow Chemical Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al., affirming a strike damage judgment of the United States District Court for the Middle District of Florida, Tampa Division, in the amount of $297,607.57.

OPINION BELOW

The Decision and Opinion of the Court of Appeals is unofficially reported at 83 LRRM 2417 (1973) and is printed in the Appendix at page 1a. The Judgment of the District Court for the Middle District of Florida appears at 82 LRRM 3169 (1971) and is printed in the Appendix at page 8a.

JURISDICTION

The Decision of the Court of Appeals issued on June 12, 1973. Rehearing was denied on August 7, 1973 and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. par. 1254(1). The District Court's jurisdiction was invoked pursuant to Section 301(a) of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of

the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Sections 13 and 7 of the Labor-Management Relations Act, 1947, 29 U.S.C. § 141 et seq., provide:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

QUESTIONS PRESENTED

1. Whether damages because of a 27-day strike in violation of a labor agreement may include losses incurred before that strike commenced as well as losses during the period of a concededly lawful 45-day strike after the expiration of the agreement? Alternatively, whether damages awarded for the lawful strike infringed on an area of labor combat that Congress specifically designed to be free and unobstructed?

2. Whether damages for the 27-day strike may include unrecovered fixed costs (overhead) in addition to the excess cost of production over a 6-month period when the plant operated 24 hours a day and with a full complement of employees?

3. Whether damages for the lawful and unlawful strikes are so commingled and intermixed as to require the entire claim to be rejected?

STATEMENT OF THE CASE

This is a Section 301 suit for damages by Dow Chemical Company [2] arising out of a strike in violation of the provisions of its labor agreement with the Union. The strike occurred at the Company's polyethylene bottle plant in Tampa which employed approximately 104 workers and was caused by the discharge of two local union officers. This strike lasted 27 days, from January 7, 1965 until February 2, 1965.[3] After the labor agreement expired and was no longer in effect the Union called the employees out on a second strike between March 15, 1965 and April 29, 1965, a period of 45 days.[4] While the damage award in this case is based upon the January strike it covers losses for the entire first half of 1965 upon the finding that the "adverse effects of the strike continued to manifest themselves until June 30, 1965" (App. 3a, 23a). During the 5-month period following the January strike the plant operated around the clock with a full complement of employees.

Prior to 1965 the Company lost money during each and every of its preceding years of operations. Over the last 6 months of 1964 operating losses reached a level in excess of $270,000 which approximated the Company's 12-month operating losses of $291,545 for 1965 when the two strikes took place. Because of the unprofitable nature of the business the Company decided to cannibalize and close its plant in early 1966.

The District Court found that the total damage amount calculated by the Company for the entire

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[2] Hereinafter the "Company."

[3] Hereinafter the "unlawful" or "January" strike.

[4] Hereinafter the "lawful" or "second" strike.

first half of 1965 of $291,779 which is the total of: (a) excess production costs of $161,431, and (b) overhead (i.e., unabsorbed fixed costs) of $130,348 to be reasonable (App. 3a, 4a, 30a, 35a).[5] The $291,779 excess strike cost calculation includes losses (overhead and excess production costs) for the first week in January —before there was any strike—and for the 45-day period of the lawful second strike.

Under the so-called Clearly Erroneous Rule the Circuit Court affirmed the District Court's damage determination of $291,779 and its finding that only the January strike "caused ruinous stresses on plant equipment when management tried to operate with replacement employees [as well as the] massive repairs [that] were done in June, to the further dimunition of production" (App. 3a-4a) and were not caused by the lawful 45-day strike in March and April (App. 3a, 25a). Contrary to this finding that it was only the January strike that caused the Company's strike damages the District Court made purported "allowances"[6] for the 45-day lawful strike in March and April (App. 25a-26a, 34a). Throughout this litigation the Company has repeatedly conceded and admitted that the 45-day lawful strike affected its operations.[7] Also

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[5] The District Court's findings of fact and conclusions of law are a photocopy of that which the Company proposed and which the District Court mechanically adopted including such typographical errors as describing the "6-month strike affected period" in the year 1966 instead of 1965. Had this error not been corrected upon the post-judgment motion of the Union it would have had a substantial impact upon the amount of damages awarded.

[6] See *infra* at pp. 7-8.

[7] For example, the Company, in its briefs to the Court below, stated that "it was impossible for anyone to say just what effect it [the lawful 45-day strike] had."

contrary to this finding, the Company's financial records that were received in evidence by the District Court show that its production cost and operating losses for the months of March and April—the period of the 45-day lawful strike—reached record all time highs.

The road to this erroneous result is strewn with legal issues worthy of this Court's attention, namely: (1) Awarding damages for the first week in January 1965, which was before the unlawful strike even began; (2) imposing damages for the lawful 45-day strike and for the months subsequent thereto of May and June 1965, which amounted to 105 of the 180-day damage period the Court below attributed to the January strike; (3) failing to take into account the greater impact of the lawful 45-day strike upon costs of production and operating losses as compared to the earlier 27-day strike; and (4) including the amount of unrecovered fixed costs (overhead) when such losses may only be realized by an employer receiving no return from productive labor as distinguished from one (as in this case) that was operating its plant around the clock with a full complement of employees during the period for which such strike damages were awarded.

The labor agreement that was breached by the January strike had an original termination date of February 28, 1965, but was extended until March 14, 1965. Thereafter the Union was free to go out on a legally protected strike and the Union promptly did so on March 15, 1965.

Damages were awarded the Company for the entire first half of 1965 in spite of the District Court's ruling that the intervening second strike was bound to have a

new impetus upon the Company's strike losses and that the Company separate and confine its losses as between the two strikes. The only evidentiary attempt to confine losses to the January strike was the submission of an exhibit that summarized the Company's operating margins for January, February and the first half of March. These operating margins totalled $119,344 and were received by the District Court as the losses for the January strike.

However, the judgment herein provides damages for strike losses amounting to $291,779 which is more than twice as much as the losses ($119,344) actually claimed for the January strike. In arriving at this greater amount the District Court "allowed" the Union a credit by reducing the amount of excess production costs for the period of the lawful strike by $246 which is less than 1% of all such damages ($161,431) included as part of the $291,779 damage award. No reduction adjustment whatever was made for 15 days of the second strike during March and the Union was charged with all losses (excess production costs and overhead) for the month of June even though that month is in closer proximity to the March-April lawful strike than to the January strike. Losses for the month of May were incongruously attributed to the lawful second strike.

These premises show that the purported allowance or adjustment for the period of the lawful strike were so minimal and irrationally conceived that the damage award can only be deemed to have penalized the Union for having called the employees out on strike after the contract had expired. In actual effect the award improperly allowed the Company to recover 6 months of

damages because of the Union's total strike activity, i.e., for the periods of the unlawful first strike and the lawful second strike.

REASONS FOR GRANTING THE WRIT

I. Whether damages for a strike called in violation of a collective bargaining agreement may encompass losses caused by a lawful strike period occurring after the expiration of said agreement is a question not previously determined by this Court except as it has analogously required the strict separation of the contemporaneous consequences of lawful and unlawful activity in its consideration of strike damage awards as authorized by Section 303 of the Taft-Hartley Act. Local 20, Teamsters, etc. v. Morton, 377 U.S. 252, 261-262.

The national labor policy recognizes that for a union to exist it must have the unincumbered right to strike for lawful purposes at appropriate times and that this fundamental right is indispensable to the resolution of labor-management disputes in a free society. The Court below has violated that policy in three respects: (1) it has imposed liability upon the Union for the period it was engaged in a lawful strike because that strike was preceded by one which was in violation of a labor agreement; (2) it has permitted damages to be calculated whereby the loss consequences of both the lawful and unlawful strike are so commingled as to have effectively permitted the Company to recover losses occurring because of a lawful strike; and (3) it has permitted the recovery of windfall damages such as: (a) those occurring during the first week in January (which was before the unlawful strike occurred); (b) those based upon the speculative assumption that the Company would have operated profitably when in any prior or subsequent year it had never done so; and (c) those based upon

overhead expenses notwithstanding that the Company operated at full capacity after the January strike.

The "intervening cause principle" this Court has recognized in Section 303 suits involving secondary boycotts conducted in conjunction with lawfully protected primary strikes is equally applicable to a claim whose parameters include a contractually prohibited strike and one occurring after the contract has expired. In *Local 20, Teamsters* v. *Morton,* 377 U.S. 252, 261-262, this Court held that "[t]he District Court was without power to award damages proximately caused by lawful, primary [strike] activities, even though the [union] petitioner may have contemporaneously engaged in unlawful acts elsewhere." And in *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 64, the institution of damage suits was expressly prohibited as "weapons of economic coercion" which would require a union to abandon its right to engage in a protected primary strike. See also *N.L.R.B.* v. *Insurance Agent's International Union,* 361 U.S. 477, 496.

The national policy of exculpating unions from the damages consequences of a lawful strike is clearly established by virtue of Sections 7 and 13 of the Labor-Management Relations Act.[8] Both of these

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[8] As this Court pointed out "the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *N.L.R.B.* v. *Erie Resistor Corporation,* 373 U.S. 221, 234. The legitimate use of strike as effectuating the federal labor policy has been likewise recognized and protected in *Internationarl Union of United Automobile Workers of America, CIO* v. *O'Brien,* 339 U.S. 454, 456-457, and *Amalgamated Ass'n, etc.* v. *Wisconsin Employment Rel. Bd.,* 340 U.S. 383, 389.

statutory mandates were considered by this Court in conjunction with union liability for a combination of lawful and unlawful acts in *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 732, and the Court held:

> "Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter."

Likewise, in *Local 20, Teamsters* v. *Morton, supra* at 255, this Court pointed out that the federally protected right to strike precludes application of traditional common law principles to tort suits based upon strike misconduct insofar as they may allow an employer to:

> ". . . recover damages by all the profits lost as a result of total strike activity, so long as some of the activity was unlawful."

In this case we seek a like preclusion of breach of contract damages that extend beyond the term of the contract and infringe upon the federally protected right to strike. There is no reason why the "intervening cause principle" should not equally apply to both Section 303 and Section 301 lawsuits. Cf. *Milk Wagon Drivers of Chicago* v. *Meadowmoor Dairies,* 312 U.S. 287, 296.

II. The award for unabsorbed fixed costs (overhead in the amount of $130.348) over a 5-month period when the Company operated its plant 24 hours a day and with a full complement of employees is in conflict with the measure of damages permitted in every other circuit court that has considered this issue.

Overhead expenses are fixed or necessary costs of operation which do not fluctuate directly with plant operations. When production is reduced during a

strike these costs continue and are not offset by income attributable to productive labor. Thus, recoverable overhead during an unlawful strike is that for which an employer does not receive a return from productive labor. In this case the Company operated its plant around the clock and with a full complement of employees following the termination of the January strike.

The foregoing principles as to the proper measure of strike damages have been consistently adhered to. See *United Electrical, R. & M. Workers* v. *Oliver Corp.*, 205 F.2d 376, 387-389 (8 Cir., 1953); *Sheet Metal Workers* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 109-110 (5 Cir., 1967); *United Steelworkers of America* v. *CCI Corporation*, 395 F.2d 529, 533 (10 Cir., 1968); *Structural Steel & Ornamental Iron Ass'n* v. *Shopmen's Union*, 172 F.Supp. 354 (D.C.N.J., 1959); and *Union Tank Car* v. *General Truck Drivers*, 305 F. Supp. 1162 (E.D.La., 1970).

In *Sheet Metal Workers* v. *Atlas Sheet Metal Co., supra*, which reversed an award of damages for overhead expenses because it was duplicative of other damages, it was pointed out that "recovery of overhead costs is limited to those costs not compensated . . . by . . . income derived from the normal course of business [i.e., from productive labor]" (384 F.2d 101, 110). *Atlas* relied upon *United Electrical Workers* v. *Oliver Corp., supra*, which makes clear that recoverable overhead during strikes is that "for which [an employer] received no return in productive labor" (205 F.2d 376, 387).

This is the only case that a federal court has allowed overhead damages—in addition to excess production

costs—for a period following the termination of a strike and when a company was operating its plant at full capacity with a full complement of workers. During the 5 months following the January strike there was no unlawful withholding of productive labor by the Union. Nevertheless the Company has recovered 100% of its overhead expense for that 5-month period.

III. The confused and erroneous commingling of damages attributable to the law and unlawful strikes in this case is such that it is impossible to ascertain which and what strike produced the total 6-month damage award that included both of these strikes.

The less than 1% reduction of excess production cost ($161,676) awarded because of the 45-day lawful strike, requiring the payment of 100% of the overhead expense incurred for the 5 months following the January strike and the inclusion of losses incurred during the first week in January before there was any strike demonstrate that the damage award in no way allocated and segregated that portion of the loss which is due to the unlawful acts of the Union and that portion of loss caused by factors in no way legally attributable to the Union. As was stated in *United States* v. *Citizens & Southern Nat. Bank of Atlanta, Ga.,* 367 F.2d 473, 480 (4 Cir., 1966), ". . . if there are actionable and nonactionable factors, the Court, in the absence of some reasonable basis in evidence, will not attempt to apportion the damages." Such a lump sum award requires the entire claim to be rejected. *Lichter* v. *Mellon-Stuart Company,* 305 F.2d 216 (3 Cir., 1962). We believe that the erroneous combining of actionable and non-actionable strike losses in this case calls for the same dismissal result.

CONCLUSION

Petitioner prays that this petition for a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals, entered in Case No. 72-1369.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1369

DOW CHEMICAL COMPANY,
Plaintiff-Appellee-
Cross Appellant,

VERSUS

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL,
Defendants-Appellants-
Cross Appellees

APPENDIX

Appeals from the United States District Court for the Middle District of Florida

(June 12, 1973)

Before COLEMAN and SIMPSON, Circuit Judges and EGES, District Judge.

COLEMAN, Circuit Judge: On an around the clock, three shifts basis, Dow Chemical Company owned and operated a plant at Tampa, Florida, which produced polyethylene containers, mostly for the Clorox Company. Dow's employees were represented by the International Union of Radio, Electrical and Machine Workers, AFL-CIO and its affiliated Local 153. The contract between the union and the company had a no-strike clause which provided for a mandatory three-step grievance procedure for the settlement of company-union disputes and which further agreed that no strike might be instituted prior to the exhaustion of this procedure.

APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1369

DOW CHEMICAL COMPANY,
Plaintiff-Appellee-
Cross Appellant,

versus

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL,
Defendants-Appellants-
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(June 12, 1973)

Before COLEMAN and SIMPSON, Circuit Judges and ESTES, District Judge.

COLEMAN, Circuit Judge: On an around the clock, three shifts basis, Dow Chemical Company owned and operated a plant at Tampa, Florida, which produced polyethylene containers, mostly for the Clorox Company. Dow's employees were represented by the International Union of Radio, Electrical and Machine Workers, AFL-CIO and is affiliated Local 153. The contract between the union and the company had a no-strike clause which provided for a mandatory three-step grievance procedure for the settlement of company-union disputes and which further agreed that no strike might be instituted prior to the exhaustion of this procedure.

This litigation had its incipiency on the morning of December 29, 1964. Charles Winn, a plant employee and President of Local 153, was on duty along with Millard Crunk, chief steward for the local. They informed the plant manager that they wanted to leave work for the purpose of going to the union hall to discuss union business with Joseph Considine, IUE field representative. Crunk was granted the requested permission but Winn was told not to leave until he had a replacement. It was ascertained that a replacement was available but that it would be some time before he could get to work. Winn would not, and did not, wait for the arrival of his replacement. The manager warned him that if he left work without permission he would be subject to appropriate discipline.

That afternoon, Winn received a disciplinary suspension for leaving work without permission. The next day the plant employee protested the suspension by staging a six hour walk-out. The plant manager protested to an IUE field representative that the work stoppage was illegal but the representative declined to urge the employees to return to work. The manager then contacted his superior officers who protested directly to IUE headquarters in Washington. That office instructed a return to work.

After an investigation which caused the plant manager to conclude that Winn and Crunk were responsible for the illegal work stoppage, they were terminated as employees. The next day, January 6, 1965, Considine, the union field representative, demanded an immediate meeting with the plant manager to discuss the Winn-Crunk termination. Three meetings failed to secure the reinstatement of the former employees and a strike was called, continuing from January 7 until February 2 when it was terminated by a state court injunction.

On February 28 the collective bargaining agreement between Dow and IUE expired. By agreement it was ex-

tended until March 14. No contract being reached, a new strike began on March 15, lasting until April 29. The legality of this second strike is not in issue.

Dow sued the union for damages for the illegal work stoppage and for the first strike, § 301 of the Labor Management Relations Act of 1947; 29 U.S.C., § 185. The case was tried to the District Court without a jury. Punitive damages were disallowed, but judgment for actual damages was entered in the sum of $297,607.65. The award was broken down as follows: for the unlawful work stoppage, $1,038; for the January 7-February 2 strike, $291,779.65; for legal expenses incurred in bring the unlawful strike to an end, $4,790. The union appeals from the damage award and Dow cross appeals from the denial of punitive damages.

The union does not contest all liability but argues that the damage award was too broad in both scope and time.

In compliance with the well known principles of the Clearly Erroneous Rule, we shall not here retry the factual issues nor do we consider it necessary to burden this opinion with an extended descriptive or historical recital of the conflicting factual contentions. We are entirely confident that the findings of fact entered by the trial court are substantially supported by the evidence in the record:

1. The work stoppage and the first strike were in breach of contract;

2. The damages sustained by the company were caused by the January strike rather than by the latter one which the union abandoned because it was unsuccessful;

3. The adverse effects of the strike continued to manifest themselves until June 30, 1965;

4. The strike caused ruinous stresses on plant equipment when management tried to operate with replacement em-

ployees; massive repairs were done in June, to the further diminution of production;

5. Supported by the company's operation records, comparing actual sales with reasonably anticipated sales as well as considering both fixed and variable production costs as adversely affected by the January strike, the total damage figure can reasonably be fixed at $291,779.65.

The judgment in favor of Dow is affirmed.

This leaves for consideration the punitive damages issue raised by the cross appeal.

In its order of December 29, 1969, the District Court described the testimony on the issue of punitive damages as follows:

> "Involved here are 120 pieces of testimony to which objection was made. The testimony is by various witnesses and is a melange of various allegations and information. Samples of it include testimony that a witness heard officials of the local and international make threats of bombing the plant; that an international field representative instructed strikers to block ingress and egress to the plant; that a local official advised sabotage of machinery; that an international field representative advised stripping the clothes off female strikebreakers; that an international field representative was present when the president of the local threatened to hire out-of-town hoodlums; that officials of both defendants participated in the mass picketing and shouting from the picket line; that one person's car was shot at, another's hit by a shot from a BB gun operated by unknown assailants; that one woman found a noxious thing attached to her car by persons unknown; that strange cars prowled about the houses of strikebreakers; that various acts of violence or danger were committed by persons unknown or strikers; and so on."

Our reading of the record has prompted no disagreement with the above summary.

The District Court then considered the punitive damage impact of this testimony as against the International Union as follows:

> "Considering each of the 120 portions of disputed testimony by itself, and remembering that the ordinary law of agency does not apply, there is no proof, as to any one, that the defendant international authorized, ratified, or participated in the tortious acts enumerated. There is, of course, proof that individual members and officers of the defendants, as well as persons unknown, committed acts of tort.
>
> "Considering the 120 pieces of testimony as whole, the requisite authorization, ratification, or participation, as well as clear proof thereof, is also lacking. Putting all the acts mentioned in the testimony together, there is not clear proof that the defendant endorsed any or all of these acts. The same is true when the testimony is examined in the light of plaintiff's entire case."

Again, we agree that this summarization finds support in the record.

Dow Chemical, the cross-appellant, contends, however, that the International Union is nevertheless liable because three of its field representatives actively participated in the above described conduct and that "the participation of the three was in effect the participation of the International Union".

This brings us face to face with the provisions of § 6 of the Norris-LaGuardia Act, 29 U.S.C., § 106, which reads as follows:

> "No officer or member of any association or organization, and no association or organization participating

> or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

As the District Court quite correctly pointed out, the decisions in this field, dealing particularly with the appropriate interpretation and application of § 6, are quite sparse. Without considering it necessary to rehash the issues there involved and the decisions there rendered, we have directed our attention to the decisions of the Supreme Court in *United Brotherhood of Carpenters v. United States,* 330 U.S. 395, *United Mine Workers v. Gibbs,* 383 U.S. 715, as well as to the decision of the Sixth Circuit in *United Mine Workers of America v. Meadow Creek Coal Company,* 263 F.2d 52 (1969), cert. denied 359 U.S. 1013.

These cases, of course, do not strike directly at the factual situation encountered in the instant appeal.

Viewing the record as a whole, we agree with the District Court when it found as follows in its order of December 29, 1969:

> "The Court holds, however, as to the international, that the testimony does not meet the stringent standards of § 6. None of the acts contained within the testimony—whether viewed singly or in totality—is supported by clear proof of endorsement by the international. Section 6 is not a rule of evidence, making the testimony inadmissible; it merely defines the type of proof and incidentally establishes the quality of proof necessary to hold unions liable. The testimony here is an aggregation of information about acts committed by certain persons at certain times. No nexus connects these acts to the union in the degree required by § 6.

> The testimony objected to, therefore, is material but irrelevant. It is directed to the issue of tort liability on the part of the union but it fails to be probative of this issue because the acts enumerated in the testimony are not connected to the union.
>
> "Evidence in the form of testimony as to the acts of union officials and members, and others, without more, is not indicative of union responibility for the torts committed. In the absence of union authorization, participation, or ratification, such testimony does not tend to show liability upon the part of the union."

We weigh this in light of the fact that this indefensible, indeed reprehensible, conduct was that of local union representative on the scene—not that of officers of the union. We do not have here the actions of an international board member, as in *United Mine Workers v. Meadow Creek Coal Company, supra,* nor do we have the union authorization or ratification which were specifically found to be present in that case. Indeed, the international board member in *Meadow Creek* was "high enough in the hierarchy of the United Mine Workers of America" to render the union liable for acts done under his "leadership", 263 F.2d at 63.

We think the District Court correctly applied the plain language of Section 6, 29 U.S.C., § 106, which specifically requires "clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof".

In the absence of such proof, Congress has seen fit to remove such activities from the usual rules of agency or *respondent superior.* Finally, we cannot say that the District Court findings of "no nexus" are clearly erroneous.

It follows that the judgment of the District Court, on both direct and cross appeals, will be affirmed.

Affirmed.

U. S. DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA

Dow Chemical Co. v. IUE

THE DOW CHEMICAL COMPANY v. INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL., No. 65-115-Civ.-T, September 14, 1971, as corrected December 7, 1971

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KRENTZMAN, District Judge: The above entitled cause was tried before the court without a jury during February 19-23, 1968, June 18-21, 1968, June 24, 1968, September 25-26, 1968, and April 27-29, 1970. The court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT

The Plaintiff, The Dow Chemical Company, for some years prior to the year of 1965, and until it sold the plant in 1968, was the owner and operator of a manufacturing facility located in Tampa, Florida, where it manufactured polyethylene bottles for sale to customers as described herein below.

The Defendants, International Union of Radio, Electrical & Machine Workers, AFL-CIO, and its affiliate Local 153, International Union of Radio, Electrical & Machine Workers AFL-CIO, represented the Plaintiff's production and maintenance employees at the Tampa plant prior to and during the labor strikes which occurred at that plant in the year of 1965 and which are referred to in greater detail below.

Under date of April 8, 1963, the Plaintiff and the Defendants entered into a collective bargaining agreement covering the employees at the Tampa plant, which agreement

had effective dates commencing as of February 3, 1963, and continuing until midnight, February 28, 1965. The International Union, hereinafter referred to as IUE, and the Local Union, hereinafter referred to as Local 153 or the Local Union, were jointly designated as the Union in this collective bargaining agreement, and each of them executed the agreement.

The agreement, in Article II, contained a comprehensive procedure for the settlement of disputes between the parties during the term of the agreement, setting forth a mandatory three-step grievance procedure, after which the parties could agree or not agree to submit the grievance in question to binding arbitration. In Section 7 of Article II, the parties agreed that neither the Union nor any of its members would engage in or permit any type of strike action until the bargaining and grievance procedure had been exhausted.[1]

[GRIEVANCE PROCEDURE]

The contractual grievance procedure first provided for informal discussion of a given grievance between the em-

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[1] Section 7—Strikes and Lockouts

The Union will not cause or engage in, or permit its members to cause or engage in, nor will any member of the Union take part in any sit-down, stay-in, slow-down, or sympathy strike. The Union will not cause or engage in, or authorize its members to cause or engage in, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with the production of the Company, unless and until all of the bargaining and grievances procedures as outlined in this Agreement has been exhausted. The Company will not cause or sanction any lockouts, unless and until all of the bargaining and grievance procedures as outlined in this Agreement has been exhausted

The intent of the above paragraph is to make permissible, after the third step of grievance procedure as outlined in Sections 3 and 8 of Article II, the decision of the Union to strike, or the decision of the Company to resort to lock out.

ployee involved and his shift foreman. If no satisfactory adjustment of the complaint were arrived at by this means, the contract then provided a formal three-step procedure, in which the grievance would be reduced to writing and would be considered and answered by the foreman and the personnel representative in the first step, by the Plant Manager at the second step, and by the Operations Manager of the Division to which the plant belonged, or his appointee, in joint review with the Plant Manager in the third step.

The grievance procedure, in Section 8, contained a further provision stating that a particular grievances could be initially heard "at the appropriate step" in cases where the matter in dispute was not within the jurisdiction of the supervisor or Union representative who would otherwise be involved.

As of the beginning of 1964, the plant contained six production lines, all of which were utilized in the production of bottles sold to The Clorox Company, which owned a nearby plant producing Clorox brand bleach, pursuant to a contractual arrangement with Dow.

The testimony and the supporting company records introduced into evidence show that the plant was operating profitably during the first quarter of 1964, with product shipments substantially exceeding forecasts.

However, a series of developments intervened between the approximate end of the first quarter of 1964 and the beginning of November, 1964, and they collectively had the effect of disrupting plant operations during that period of time and rendering the operating figures abnormal and nonrepresentative. First, the then single customer, Clorox, radically changed its bottle design, necessitating a retooling and a different method of operation by Dow. Second, a decision was made to try a completely new type of tooling, referred to as "spin tooling" or "spin-die" tooling, and

installation of this innovation was commenced on all six lines, beginning in June and July. The innovation was later abandoned.

Third, the company embarked upon an ambitious program of plant expansion and capital additions, installing three additional production lines on account of new and anticipated customers. The installation of two of these lines, later used to produce bottles for the A. E. Staley Company, a starch manufacturer at Jacksonville, was commenced in July and was not finally completed until October or November. A third new line installed to make wide-mouth fruit drink bottles was also installed in 1964, and was ready for use by the end of the year. The Plaintiff had conducted in-depth market research among potential customers and distributors in the market area and had concluded that it had a ready market for a substantial quantity of these bottles. These bottles were to be produced on the new line mentioned above, and also on lines used to produce Clorox bottles, during times when Clorox bottles of particular sizes were not being produced. It was shown by testimony from both sides that a line could be switched from Clorox bottle production to fruit drink bottle production simply by switching the molds and type of plastic used, and perhaps by making an adjustment to the speed of the machine.

[FIGURES DISTORTED]

The testimony from both sides is that the factors discussed above had the effect of seriously, although temporarily, distorting the operating figures, one of the defense witnesses estimated that the spin tooling experiment alone resulted in a 75% loss of production for six months. Although this estimate appears to be exaggerated, the company's accounting records for 1964 support the testimony, showing that sales exceeded forecasts through April, 1964, then dropped consistently below forecasts until November,

then rose above forecasts again during November and December.

As of December 29, 1964, plant employee Charles Winn was the President of Local 153, and plant employee Millard Crunk was Chief Steward of Local 153, although IUE Field Representative Joseph E. Considine was regularly and actively involved in dealing with the plant management in regard to union-management matters at the plant.

The plant regularly operated around the clock, on a three shift basis.

On the morning of December 29, 1964, Winn and Crunk, both of whom were then working in the plant, informed the Plant Manager, R. E. Torrance, that they wanted to leave work in order to go to the union hall to discuss union business with Considine. After some discussion with these men and with Considine, by telephone, Torrance granted permission for Crunk to go, but stated that Winn could not leave work until a replacement for him was secured. An off-duty employee, Donald Padgett, was called and asked to report in to replace Winn, and he agreed to do so, but Padgett could not be at the plant as early as Winn wished to leave. Winn was unwilling to wait, and he eventually stated to Torrance that he intended to leave with Crunk and without waiting for Padgett to report. Winn admits that he did leave without permission and after Torrance had told him that if he left he would be doing so without permission, and indicated that he would be subject to discipline.

After talking with Winn and Crunk at the union hall, Considine requested a meeting with the Plant Manager during the afternoon of December 29, and such a meeting was held. During the course of it, Considine demanded to know what action Torrance intended to take against Winn, and the meeting culminated in Torrance's giving Winn a disciplinary suspension, to which the Union objected, and as to which the Union at that time filed a written grievance.

Since the Plant Manager had meted out the disciplinary action, and since he was the highest ranking company representative at the plant, the parties agreed that the provisions of Article II, Section 8, of the contract would apply, so that the grievance would initially be heard at the second, or Plant Manager, step. They further agreed that their discussion on the afternoon of the 29th would serve to satisfy Step 2 of the grievance procedure, and the Union then requested that the grievance be advanced to Step 3, which would involve the Divisional Operations Manager, and Mr. Considine wrote this request on the grievance document. Since the Operations Manager who worked at Dow's Cleveland, Ohio, office, was already scheduled to be in Tampa on January 11, 1965, on another matter, it was agreed that he could hear the grievance in Step 3 at that time.

[Work Stoppage]

Shortly after this meeting adjourned, Chief Steward Crunk with the permission of the Plant Manager, stationed himself in the plant lunchroom during the work breaks which occurred between 6:00 and 6:20 p.m., talking to the employees concerning Winn's suspension. Following this, at midnight, there was a work stoppage while the employees engaged in a meeting on plant premises, at which meeting Crunk and Winn spoke to the employees from atop parked cars. During the same night, Millard Crunk telephoned Local Union No. 915 of the International Brotherhood of Electrical Workers in Tampa and secured a statement from that Union that it would perhaps picket the Dow plant the following day, Crunk having asserted that Dow had a non-union contractor doing some electrical work within the plant.

Local 915 did in fact picket the plant the following day, precipitating a walkout and shutdown from 11:00 a.m. to 5:00 p.m. When the Local 915 picket appeared, Crunk informed plant management that the employees intended to

walk out of the plant. After that, Plant Manager Torrance attempted to contact Joseph Considine by telephone, but, being unable to do so, he called Edward Lussier, who was also an IUE Field Representative, and solicited his aid in preventing the impending walkout. Despite the language of Article II, Section 7, of the collective bargaining agreement, Lussier refused to instruct or ask the plant stewards to remain at work, or to do anything other than to try to reach Considine, an effort in which he apparently was unsuccessful, inasmuch as the plant management heard nothing from Considine until that evening after the walkout was over.

After this walkout commenced, the Plant Manager again called Lussier, protested the walkout, and appealed for his assistance, Lussier then asked to speak with a local union official. After talking with Crunk, Lussier declined to instruct or request the employees to cease the work stoppage, and stated to Torrance that he supported them in their action.

Being unable to secure any help from Lussier, Torrance contacted his superiors, who protested the walkout directly to the Defendant I.U.E. at its Washington, D.C., headquarters, both by telephone and by telegraph. The Plant Manager also appealed directly to the employees themselves, without avail.[2]

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[2] It is noteworthy that on this occasion, as well as when the Plant Manager went to ask Crunk to take Lussier's call that remarks were made to the Plant Manager that the union President was on suspension and that the employees could do nothing without their President. It appears to be more than coincidental, in view of Crunk's nocturnal call to the picketing union, that the Plaintiff's labor troubles on this occasion paralleled Winn's suspension in time, the defense witnesses testifying that the employees immediately became agitated when Winn was given the suspension, and it appearing that the Local's officers made no move to return the employees to the plant until after Torrance agreed, in a 5:00 p.m. conference with them, that Winn's suspension was then over.

[Return to Work]

It is stipulated that the employees did, however, return to work as soon as IUE representatives in Washington telephoned the leaders and gave them such instructions. Upon receiving these instructions, Winn, Crunk and several of the local members went into the plant and, in a short conference with plant management, offered to bring or attempt to bring the employees back, after ascertaining that Winn's suspension was now over, and that the employees would be allowed to return.

The employees then returned to work, but normal production was not obtained until about 10:00 p.m. due to the necessity for gradually heating up and starting the blow bottle machines.

Upon returning from a trip out of town that evening, Joseph Considine telephoned the Plant Manager at home, expressing concern over the work stoppage and asking if there was anything he could do. Torrance replied that Considine was too late to help, but that the walkout was illegal, and that legal counsel at the company's office would decide whether damages would be sought. The court finds that Torrance did not, as the defense contends, in this conversation, state that there would be no disciplinary action so far as he was concerned, but that the question had been taken out of his hands by the home office.

The defense witnesses also testified that Torrance stated, during the conference at about 5:00 p.m. on December 30, that no one would be fired on account of the work stoppage. These witnesses offered differing accounts as to the nature of the statement made, and the Plaintiff's witnesses testified uniformly that Torrance insisted that the walkout was wrong and illegal, and that there was noting to discuss until the employees were back and the plant running. It is found that Torrance did not say that no one would be fired on account of the work stoppage, or words to that effect.

After December 30, and during the next five days, Torrance investigated the work stoppages of December 29 and 30, discussing them and securing reports as to them from the supervisory staff, and he concluded that Crunk and Winn were responsible. He therefore terminated them as employees of the company on January 5, 1965, doing so in an interview during which he handed each of them a letter setting forth the reason for discharge. Winn testified in this proceeding that he had been expecting disciplinary action, and Crunk admitted that he had stated to Torrance at the time that he had been expecting something.

However, at about 12:00 noon on the following day, Joseph Considine telephoned Torrance and demanded an immediate meeting as to the terminations, threatening that he would otherwise strike the plant. The Plant Manager acceded to this demand, and such a meeting was held, lasting from 1:00 p.m. until 5:30 p.m.

[Legality of Strike]

The question whether the strike which ensued on January 7 was in breach of contract essentially depends upon whether the parties, as the Defendants contend, consented and agreed to treat this meeting of January 6, 1965, as the third and final step in the contractual grievance procedure, with the Plant Manager sitting as the appointee of the Operations Manager. The court finds that the Plaintiff did not so agree or consent, and that the Plaintiff offered no more than to treat the January 6 meeting as fulfilling the second step of the grievance procedure.

It is noted that both parties were aware that the Union would be in a position to engage in a legal strike if the Plaintiff were to agree to, in effect, dispense with the third step, and that Plant Manager Torrance credibly testified that he was determined to avoid a strike if possible. It is commonly known that grievance procedures in labor agreements are in fact designed and used for the precise purpose

of avoiding economic strife, and that they accomplish this purpose, in large part, by establishing minimum periods of time for peaceful discussion and negotiation of disputes, during which periods of time a compromise may be reached or, at least antagonisms may ameliorate to a point where a resolution through the good offices of an impartial arbitrator may be agreed upon as an acceptable alternative to economic warfare. It is not a reasonable argument that the Plaintiff would have merely consented to abandon the protection afforded it by the contract.

It is clear from the testimony of both sides that the Union's inclination to strike was brought into the January 6 discussion several times, and defense witness Padgett agreed that the Plant Manager insisted that a strike would be illegal, which is clearly inconsistent with any argument that he was treating the meeting as fulfilling the third step of the grievance procedure.

[Further Agreement]

The defense witnesses also agree that the company representatives several times insisted that the dispute could be arbitrated, which is inconsistent with any acquiescence on their part to the legalizing of a strike.

No defense witness testified that the Plant Manager, or anyone for the company, ever said that the January 6 meeting was, in so many words, a third step meeting, and their testimony is, in effect, that they derive their contention as to this from Torrance's conduct during the meeting.

It is plain from the agreement that the Union could not unilaterally advance the grievance, under Article II, Section 8, beyond the second step where the Plant Manager had jurisdiction to reverse his own actions, and the defense witnesses agree that Torrance never at any time stated that he was acting as the Operations Manager's appointee, as provided in Step 3 of the grievance procedure.

While contending that they considered the January 6 meeting as being third step, none of the Union witnesses testified that any of them denied that a strike would be illegal when the company representatives so insisted.

While the Defendants contend that Torrance had secured commitments from his superiors to uphold the terminations, so that a third step meeting would have been futile the only testimony as to Torrance's conversations with other persons in the company is Torrance's own, and he testified that he spoke only quite briefly with the Operations Manager, and that the Operations Manager gave him no such commitment. Two others from whom Torrance sought advice, and who concurred with him, a company attorney and the Industrial Relations Manager, were in staff positions and had no authority to sustain or overrule his actions, nor is there any evidence that they offered any commitments.

The defense witnesses admit that Torrance, when he said anything about steps, said that he considered the grievance to be in second step.

Finally, defense witness and Chief Steward Crunk testified as to the Union's position that these grievances "superseded" the grievance procedure, and Joseph Considine admitted that his fellow Field Representative, Edward Lussier, took the position, on the morning of January 7 and just before the strike commenced, that the termination of the local union president erased the grievance procedure.

[Conclusion]

Reason compels the conclusion that the Defendants' grievances as to the terminations of employees Charles Winn and Millard Crunk were never processed beyond the second step of the contractual grievance procedure.

At the conclusion of the January 6 meeting, Plant Manager Torrance indicated a desire to postpone a final answer

as to whether he would rescind or modify the terminations under discussion until the following morning, and it was agreed that the Union representatives would meet with the company representatives at the plant on the following morning at 8:00 a.m., which was done. At this meeting, Torrance gave Considine a letter confirming that the terminations would stand, to which Considine replied that he would let Torrance know what action he would take.

Later that day, Considine demanded and secured another meeting with Torrance, at 1:30 p.m., threatening that there would otherwise be a strike at that time. Such a meeting was held, with Torrance and Office Manager John Parco attending for the company, and with Considine and Lussier attending for the Union, and Considine again demanded the reinstatement of Crunk and Winn. Upon Torrance's refusal, Considine walked to the window and waved to Millard Crunk, who was outside with a picket sign. Crunk then commenced picketing, and a general strike, which is stipulated as being the responsibility of the Defendants, began. This strike continued until February 2, 1965, when it was enjoined as being in breach of contract by order of the Circuit Court for Hillsborough County, Florida. It was necessary for the Plaintiff to expend the sum of $4,790.00 in legal expenses to secure such injunction.

The parties' collective bargaining agreement expired as of midnight, March 14, 1965, the expiration date of February 28, 1965, having been extended, and the Defendants then commenced a second strike against the Plaintiff, which strike was formally continued until April 29, 1965, at which time the Defendants terminated all striking and picketing against the Plaintiff in return for the Plaintiff's agreement to drop a contempt action then pending in the state court.

Subsequent to these events, the Plaintiff filed the present action for damages against the Defendants, jointly and severally. The Complaint is in four Counts. Count I seeks

damages occasioned by the work stoppages of December 30, 1964, and January 7-February 2, 1965. Count II sought damages only against Local 153 for the stoppage which occurred during the night of December 29-30, 1964, but the Plaintiff and Defendants have since represented to the Court that Local 153 is now defunct, and the Plaintiff states that it therefore does not wish to pursue Count II. Count III sets forth a claim against both Defendants for tortious conduct against the Plaintiff engaged in by Union ratification or participation of the Defendants. Count IV sets forth a claim for punitive damages against both Defendants in connection with each of the aforesaid Counts, the allegation being that the Defendants engaged in the conduct described in Counts I, II and III willfully, wantonly and maliciously.

[ORDER ISSUED]

Under date of October 20, 1965, the court issued an order dismissing Count IV insofar as it relates to and demands punitive damages on account of the matters alleged in Counts I and II, the court finding as a matter of law that punitive damages cannot be awarded for the breach of a no-strike agreement in a collective bargaining agreement, regardless of the circumstances.

Subsequently, and under date of December 29, 1969, the court granted the Defendants' motion to strike 120 portions of the testimony of the Plaintiff's witnesses as to the claim set forth in Counts III and IV against the IUE. The parties agree that the effect of such order is to render Counts III and IV amenable to dismissal as against the IUE, and the Defendant IUE has filed such a motion to dismiss. The plaintiff has stated to the court that if Counts III and IV are to be dismissed as against the IUE, it does not wish to pursue those counts as against Local 153, since Local 153, as above noted, is now defunct and has no assets.

In view of the foregoing, it is unnecessary to make findings of fact as to Counts II, III and IV as such.

As to Count I, and in addition to the question whether they complied with the terms of Article II of the collective bargaining agreement before embarking upon the strike of January 7, 1965, the Defendants have asserted that they were entitled to strike even if they did not so comply, under a line of cases emanating from Mastro Plastic Corp. v. NLRB, 1956, 350 U.S. 270, 76 S.Ct. 349, 37 LRRM 2587 and holding that a strike may not be subject to a contractual no-strike agreement under certain circumstances. In connection with this asserted defense, the court finds as follows: First, it is found that the terminations of employees Winn and Crunk, in protest of which the Defendants engaged in the January 7, 1965, strike, were not motivated by any desire on the part of the Plaintiff to injure or destroy the Union, nor were these terminations motivated by any legitimate union activities engaged in by either of these employees. On the contrary, these terminations were motivated by the fact that the Plant Manager in good faith believed that these employees were jointly responsible for the work stoppages of December 29 and 30, 1964, in violation of the Union's contractual obligations and contrary to the individual obligations of these employees as employees and as local union officials.

The court has already found that the Plaintiff did not, through any of its representatives, agree generally that it would not discharge or discipline the employees on account of the events of December 30, 1964. If this were not so, the court would yet find that the Plaintiff's Plant Manager at no time made any statement or commitment to the effect that action would not be taken against employees Winn and Crunk, as leaders or instigators of the December 30 work stoppage, as distinguished from the employees generally.

It is further found that the terminations of Winn and Crunk were not an attempt to, and did not threaten to,

undermine the collective bargaining agreement, or destroy the collective bargaining relationship, and that these terminations did not in any way impair the ability of either the IUE or Local 153 to continue to function as representatives of the Dow employees. It appears that the Union had numerous other stewards in the plant and that Local 153 had other officers, in addition to the fact that the IUE had two Field Representatives in the area, one of whom was regularly and actively involved in administration of the Union's affairs at the Dow plant. It is not shown that Local 153 could not have elected a new President, and it is not shown that the Plaintiff ever refused to deal with either of the Defendants.

It is further found that the Union chose to strike on January 7, without completing the contractual grievance procedure, although it could have carried the Winn and Crunk discharges through that procedure within a reasonable time.

[Issues of Damages]

The parties have submitted exhaustive briefs on the issue of damages suffered by the Plaintiff on account of the matters alleged in Count I of the Complaint.

As to the work stoppage occurring from 11:00 a.m. until 5:00 p.m. on December 30, 1964, the Plaintiff's Office and Personnel Manager testified that he calculated the damages emanating therefrom by multiplying the number of hours of down time (6.5) plus the number of hours of start-up time (3.5), or 10 hours, times the standard overhead cost rate per machine hour ($12.76) times the number of machines then running (5) to arrive at a figure of unabsorbed overhead of $638.00. He added a figure of $400.00 for excess labor and scrap caused by the cold start-up, based on prior comparisons done by him for this type of operation, and stated a claim of $1,038.00 for the December 30 stoppage. It was agreed between counsel that

this testimony would not be objected to on formal grounds, in view of the difficulty of doing a sophisticated calculation for such a short work stoppage. The court therefore finds that the Plaintiff was damaged in the sum of $1,038.00 by the work stoppage of December 30, 1964.

There are numerous fact findings to be made in the course of determining the damages suffered by the Plaintiff because of the January 7—February 2, 1965, strike.

The first question relates to the period of time during which the Plaintiff continued to suffer damage due to this strike. The Plaintiff has produced sworn testimony by its Plant Manager and by its Office and Personnel Manager, (who later became Plant Manager), both of whom were present in the plant before, during and after the January strike, that the adverse effects of the strike continued to manifest themselves at least until June 30, 1965. The Defendants have submitted no testimony on the issue by anyone who was in the plant after January 7, but have introduced an expert witness who estimated that the strike's after-effects would dissipate within ten days, although agreeing that the effects of a general strike in a manufacturing operation must be expected to outlast the strike itself.

The Plaintiff's management personnel testified that the production equipment in the plant was subjected to ruinous stresses during the 27 days of the January strike due to the company's emergency efforts to get production by applying heroic measures. After allowing the plant to stand idle for a few days, a management decision was made that it was imperative to use all possible means to secure production of Clorox bottles because the Clorox Company was the plant's major customer and a failure to produce for Clorox during any substantial period of time could well lead to the permanent loss of the customer, in addition to

impairing relationships with Clorox in other parts of the country.

[New Employees Hired]

Consequently, new employees were hired, and technical and supervisory personnel who could be spared from other Dow plants were brought in to train the new employees and to do production work. The necessity to use the plant equipment for training purposes, to operate it with persons who were not familiar with it, and to do maintenance with inexperienced personnel, with efforts to get production continuing around the clock, resulted in severe difficulties with equipment. The plant management testified that these difficulties continued to manifest themselves in terms of high costs and low production until a program of massive repairs was done, at the expense of production, during the month of June, and that the problems thereafter diminished until September, when the situation could be described as having returned to normal. The Plaintiff introduced the plant's operating records for the time in question as well as for other periods, and the production and cost figures by their trends and fluctuations, corroborate the testimony of the Plaintiff's witnesses.

The Defendants' expert witness, on the other hand, testified that he did not base his estimate as to the strike-affected period on any evidence, but merely chose a ten-day period arbitrarily, although he had the opportunity of interviewing the Plaintiff's operating personnel and the Plaintiff's Comptroller, who had arrived at a different period, and had access to all materials developed during discovery.

There appears to be no logical reason to doubt the Plaintiff's testimony that the January strike affected production and costs at least throughout the first six months of 1965, and the court so finds.

Using this basis, the Plaintiff has submitted a comparison of the latter six months of 1965 as a means of cal-

culating its damages, and contends that this period of time should be accepted as an normal or representative operating period. The Defendants contend that the last six months of 1964 are more representative of normal operations.

The court has previously discussed the evidence, much of which is undisputed, showing that the plant experienced many changes and disruptions of an unusual and nonrecurring nature, during the middle six to seven months of 1964, and that the plant facilities were substantially different in 1964 than in 1965, due to extensive capital additions. It appears clearly, and it is found, that neither the first nor the last six months of 1964 could reasonably be said to compare to any period in 1965 in terms of the nature of the plant facilities or in terms of changes and disruptions unrelated to strike activity. It further appears, and it is found, that the last six months of 1965 is the period of time most comparable to the first six months of 1965 in the same terms. This comparison is in some respects favorable to the Defendants, since a wage increase given in March of 1965 would increase costs during only a part of the first half but during all of the last half.

[NEXT QUESTION]

The next question concerns the allowance to be made, in calculating damages, on account of the legal strike which occurred on March 15, 1965. The Plaintiff has produced extensive testimony, which appears to be well supported by its operating statements, to the effect that this strike had little relative effect as compared to the January strike. The Plaintiff's testimony is that the disabling maintenance problems which plagued it through June had their genesis in the stresses and lack of proper maintenance occurring during January. By the time of the March strike, the Plaintiff had replaced its key personnel and had non-striking maintenance men and machine operators with roughly two months of training.

In addition, the Plaintiff had ample time to prepare for this strike, since it occurred after extensive contract renewal negotiations and it did prepare with a revised operating plan enabling it to continue to operate without interruption and with ⅓ less personnel.

Although Union pickets continued to walk in front of the plant until the Union abandoned the strike on April 29, the March strike was a failure and the Union abandoned it without securing any objective.

After conferring with the plant's operating personnel on an extensive basis, and consulting the operating records, the Plaintiff's Comptroller arrived at an estimate as to the relative effect of the March strike, in which he projected an increase in production during April and May at the same rate experienced during February, after the January strikers returned. No allowance was made for June, due to the program of massive repairs undertaken during that month.

The Defendants, on the other hand, have offered no proof in contravention of the Plaintiff's testimony as to the effects of the March strike, but have been content to attack the Plaintiff's figures.

Although it is manifestly impossible to ascertain the effect of the March strike with precision, projections or estimates based upon relevant evidence are acceptable for the purpose of calculating damages, and the estimates produced by the Plaintiff are reasonable and supported by documentary evidence as well as the testimony of operating personnel.

In connection with its various damage calculations, the Plaintiff has introduced testimony as to the amount of product that it could have produced during the first six months of 1965, and as to the amount of product that it could have sold. The defendants contest both figures.

First, the Plaintiff's Sales Manager introduced three exhibits containing forecasts of sales for each of the three

products that the Plaintiff planned to produce and sell.

The Sales Manager testified that these sales forecasts were made by him in the ordinary course of business, and he testified that he has been performing this function for the Dow company for many years. He testified as to the manner in which each of the three forecasts was arrived at.

[CLOROX BOTTLES]

As to Clorox bottles, he testified that these forecasts were made on a monthly basis, using monthly requirement sheets furnished to him by Clorox during the month prior to the month in which the bottles were to be produced and sold, together with his judgment as to production capacity, as to which he conferred with plant personnel. The Clorox forecasts might be revised from time to time right up to the month for which they were made, if changes in the underlying data justified revisions.

Forecasts for bottles furnished to the A. E. Staley Company, the plant's second largest customer, were made by the same general procedure, but from customer requirements initially furnished on a quarterly basis and modified through information received from field salesmen on a monthly basis. During the first six months of 1965, the plant in fact did not produce Staley bottles, but inventories of these bottles were very high, so that sales forecasts could be and were still made, with deliveries coming out of inventory.

While the Defendants contend to the contrary, the Sales Manager did not testify that sales forecasts for wide mouth fruit drink bottles were similarly rendered during the strike-affected periods. On the contrary, he testified that the fruit drink bottle was a new product which the company prepared to produce and planned to launch in 1965. In the course of this preparation, the market research department contacted potential customers to determine what the selling opportunity might be. After that specific contacts were made with distributors in the marketing area selling the

same type of bottle. Information from the distributors' sales records was obtained and used as a basis for an estimate as to how much of this business Dow could anticipate. In addition to that, Dow's salesmen went directly to the high-volume users in the area and obtained from them estimates as to what they would buy from Dow.

All of this information was used by the Sales Manager in arriving at a figure which he then drastically reduced in anticipation of start-up problems due to the newness of the product.

The Sales Manager was not asked, and did not testify, as to precisely when the fruit drink bottle forecasts were rendered in monthly terms, but he did testify in terms which suggest that the market was at all times projected on a monthly basis.

[FINDING]

Considering the testimony as to actual monthly requirements furnished by Clorox and Staley, and considering the in-depth market research and actual distributor and customer contacts underlying the fruit drink forecasts, it is found that the Plaintiff has sufficiently proved the market which existed for its products during the first six months of 1965, and it is reasonable to conclude that the Plaintiff could have sold the amounts projected in its forecasts, if not substantially more.

As to the question of the plant's ability to produce, the Plant Manager testified unequivocally that he could have produced the bottles. The production equipment was there, as were the experienced employees, and the Plant Manager testified that the lines were operative and ready to run. The sales forecasts for January-June 1965 called for 1,147,300 pounds of production of Clorox and Staley bottles, and the Plaintiff's Exhibit 28 shows that the plant actually produced 1,372,164 pounds of these bottles in July-December, 1965, while Plaintiff's Exhibit 21 shows that the plant pro-

duced 1,293,080 pounds of these bottles in the first six months of 1966. Additional figures in Plaintiff's Exhibit 21 shows that the plant, on a monthly basis, produced approximately 248,000 pounds of Clorox and Staley bottles in two different months, for a rate of approximately 1,500,000 pounds in six months. It is apparent that the plant had and demonstrated the ability to produce the 1,639,000 pounds reflected in the forecasts, when production of fruit drink bottles is added to the requirements of Clorox and Staley.

Nor is there any substantial question but that the plant could readily produce the fruit drink bottle. In addition to the Plant Manager's unequivocal testimony that he could do so, there is testimony from a defense witness and former maintenance man that a given line could easily be switched from Clorox bottles to fruit drink bottles simply by changing the molds and plastic, and perhaps adjusting the speed of the machine. The Plaintiff's Comptroller also testified that the Company had already produced and sold this bottle at other plants.

Using the last half of 1965 as a representtive or, comparable operating period, considering the first six months of 1965 as being affected by the January strike, allowing for the probable effect of the March strike in the manner indicated herein, and utilizing the Plaintiff's projections as to what production and sales would have been in the absence of strikes, the Plaintiff's Comptroller calculated its damages in a variety of ways, and the Plaintiff has submitted additional calculations by way of briefs. The record contains an abundance of information from which any number of calculations might be made.

[Calculation Accepted]

The court finds that the calculation offered by the Plaintiff's Comptroller and expressed as Case III in the Plaintiff's Exhibit 28 constitutes a fair and reasonable calculation of the Plaintiff's recoverable damages, based

on relevant evidence and reasonable projections and comparisons. In this calculation, the Comptroller figured the amount of fixed production costs which the Plaintiff could have absorbed, but did not, through the sale of its projected production as compared to actual sales. To this is added the amount of the Plaintiff's variable production costs which costs actually achieved during the six-month period of July-December, 1965.

The total damage figure, which is found to be reasonable, is $291,779.57.

The Defendants have criticized this calculation at great length because of the Comptroller's use of a statistical method, known as the least squares method, for allocating fixed and variable costs out of total production costs. The Defendants produced an expert witness, a statistician and management consultant, who gave his opinion that this method cannot satisfactorily be used for the purpose, and that the amount of data used by the Plaintiff was in any event insufficient for an accurate result. The Plaintiff produced its own expert, a statistician who is also trained as an accountant, and who has had many years of experience in splitting fixed and variable costs in connection with the Plaintiff's own manufacturing operations. The Plaintiff's expert testified not only that the method is suitable, but that the Dow company customarily and regularly uses it to split fixed and variable costs, with the resultant information being used in the company's budget plans, business estimates, etc. In addition, the Defendants introduced an expert accountant who had also made a calculation involving the splitting of the same production costs into fixed and variable amounts, and this expert's fixed cost figure was within 5.5% of that obtained by the Comptroller. This witness agreed, furthermore, with the Plaintiff's statistician that neither method of splitting costs reveals an absolute division, and that the best that can be done with any method is to secure an approximation.

The court concludes and finds that the calculation made by the Plaintiff's Comptroller did in fact yield a reasonable approximation as to the split between fixed and variable costs for the period of time involved, and that the damage calculation expressed as Case III of the Plaintiff's Exhibit 28 furnishes an appropriate basis for an award of damages.

This conclusion is supported and confirmed by the observation that numerous alternative calculations which do not involve the use of the least squares method have been shown to yield results which are comparable or which lead to a higher damage figure. These include a simple comparison of the overall profit or loss in the strike-affected period with that experienced in later periods, and a calculation utilizing the Defendant's figure as to what fixed costs should be.

[Final Question]

The final question of fact is whether the Plaintiff acted reasonably in refusing to discharge the 29 employees that it had hired during the January 7—February 2 strike, in the maintenance and machine operator classifications that were most sorely needed, to make room for returning strikers, when the strikers returned under duress of the February court order. The Defendants argue that the Plaintiff failed in a duty to mitigate damages by so refusing.

The argument ignores the testimony of the Plaintiff's plant management that it was necessary to offer the replacements permanent employment in order to get them at all, so that the Plaintiff did not have the option, after February 2, of summarily discharging them. It was obviously reasonable for the Plaintiff to hire these employees in the first place, because there was no way for the Plaintiff to know how long the January strike would last and arrangements to get production had to be made. Except for the intervention of the state court, that strike might

have lasted forever. The Union evidenced no intention of terminating it voluntarily. If the Plaintiff had not employed replacements in the most needed positions, it would have simply been at the Union's mercy.

It was reasonable for the Plaintiff to retain the replacements in February because they were by then partially trained, because the Plaintiff would have been required to dishonor its commitment to them in order to do otherwise, and because, by releasing them, the Plaintiff would have acquired a reputation which would have impaired its ability to employ replacement employees in the event of future labor difficulties. In addition, the Plaintiff's witnesses testified that the damage which eventually required massive repairs to the machinery had already been done by the time the strikers offered to return, so that it is dubious whether the Plaintiff would have gained any real advantage by rehiring the strikers.

[Conclusions of Law

The parties to this proceeding have stipulated to most of the legal principles governing this action.

It is stipulated, and the court finds, that it has jurisdiction of this action, in all counts, and of the parties (29 U.S.C. § 185; Hurn v. Oursler, 289 U.S. 238 (1933)).

The Defendants herein are entitled to a dismissal of Count IV of the Complaint as it relates to Counts I and II for the reason that punitive damages are not recoverable in an action for breach of contract (Shoeworkers Local 127 v. Brooks Shoe Mfg. Co., 298 F.2d 277, 49 LRRM 2346).

The Defendants are entitled to a dismissal of Count II of the Complaint for the reason that the parties agree that Local 153, International Union of Radio, Electrical & Machine Workers, AFL-CIO is now defunct without assets and said Count II is not directed toward the De-

fendant International Union of Radio, Electrical & Machine Workers, AFL-CIO.

The Defendants are entitled to a dismissal of Count III of the Complaint, the court having stricken the Plaintiff's testimony, in pertinent part, adduced in support of said Count as to the International Union of Radio, Electrical & Machine Workers, AFL-CIO, and the court having found that the Plaintiff's evidence does not show that said International Union authorized, participated in, or ratified the conduct complained of, and it appearing by agreement that the Defendant Local 153 does not now exist (United Brotherhood of Carpenters v. United States, 330 U.S. 395, 19 LRRM 2406 (1947)).

The Defendants are entitled to a dismissal of Count IV of the Complaint as it relates to Count III for the reasons stated in regard to the dismissal of Count III.

[LIABILITY]

The Defendants were jointly and severally liable to the Plaintiff, and the remaining Defendant International Union of Radio, Electrical & Machine Workers, AFL-CIO, is liable to the Plaintiff in damages for having breached its collective bargaining agreement with the Plaintiff by causing or engaging in a work stoppage or labor strike against the Plaintiff at its manufacturing plant at Tampa, on December 30, 1964, and from January 7, 1965, through February 2, 1965 (International Union of Operating Engineers, Local 653 v. Bay City Erection Co., 5 Cir. 1962, 300 F.2d 270, 49 LRRM 3021; Lewis v. Benedict Coal Corp., 5 Cir. 1958, 259 F.2d 346, 43 LRRM 2237).

The Plaintiff is entitled to recover any portion of its fixed operating costs incurred during the period affected by the unlawful strike which it would have been able to recover through the sale of increased production but for the loss of such production due to the strike. The plaintiff is further entitled to recover that amount of its variable production

costs incurred during the period of time affected by the unlawful strike which is in excess of those variable costs which it would have experienced but for the strike. (International Union of Operating Engineers, Local 653, v. Bay City Erection Co., supra; Lewis v. Benedict Coal Corp., supra; I.U.E. v. Oliver Corp., 8 Cir. 1953, 205 F.2d 376, 32 LRRM 2270; Oil Screw Noah's Ark v. Bentley & Felton Corp., 5 Cir. 1963, 322 F.2d 3; International Brotherhood of Teamsters, etc., Local 25 v. W. L. Mead, Inc., 1 Cir. 1956, 230 F.2d 576, 37 LRRM 2679).

In calculating its damages, the Plaintiff is entitled to rely upon information as to relevant factors, including estimates and projections of sales and production, enabling the court to estimate the approximate amount of damages incurred. The risk of any uncertainty arising out of the use of such estimates and projections should be thrown upon the Defendant (Story Parchment Co. v. Patterson Paper Company, 282 U.S. 555 (1931); cases cited next above; United Steelworkers of America v. CCI Corporation, 10 Cir. 1968, 395 F.2d 529, 68 LRRM 2059, cert. den. 393 U.S. 1019, 70 LRRM 2225; Roadway Express, Inc. v. Highway Truck Drivers and Helpers Local No. 107, D.C. Pa. 1969, 299 F.Supp. 1058, 72 LRRM 2037; Union Tank Car Co. v. General Truck Drivers, Warehousemen & Helpers of America, Local Union No. 5, E.D. La. 1970, 309 F.Supp. 1162, 73 LRRM 2425).

The Plaintiff is further entitled to recover legal expenses incurred in a separate suit brought to enjoin the illegal strike (Aircraft & Engine Maintenance, etc. v. I. E. Schilling Co., Inc., 5 Cir. 1965, 340 F.2d 286).

The Plaintiff did not condone or waive its right to take disciplinary action against employees Charles Winn and/or Millard Crunk by permitting the employees generally to return to work following the work stoppage of December 30, 1964, or by any other act or omission (NLRB v. Marshall Car Wheel & Foundry Co., 5 Cir., 1955, 218 F.2d 409,

35 LRRM 2320; Packers Hide Ass'n. v. NLRB, 8 Cir. 1966, 360 F.2d 59, 62 LRRM 2115).

The Plaintiff did not commit any unfair labor practice by terminating the employment of employees Charles Winn and Millard Crunk, and if these terminations had constituted unfair labor practices, they would not have come within the rationale of Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 37 LRRM 2587 (1956), so as to legitimatize a breach of contract strike in protest of the terminations, since grievances as to the discharges could have been carried through the contractual grievance procedure within a reasonable time (Danner Press, Inc. v. NLRB, 6 Cir. 1967, 374 F.2d 230, 64 LRRM 2623; Mid-West Metallics, 121 NLRB 1317, 42 LRRM 1552), since the discharges would not have constituted glaring or flagrant unfair practices (Drake Bakeries v. Local 50, 370 U.S. 254, 50 LRRM 2440; Arlan's Department Store, 133 NLRB 802, 48 LRRM 1731), and since these terminations were not of such a nature as to threaten the ouster or destruction of an incumbent union or a bargaining relationship (Roadway Express v. Highway Truck Drivers, D.C. Pa. 1961, 299 F.Supp. 1058, 72 LRRM 2037).

The plaintiff did not violate any duty to mitigate damages by hiring replacements for certain employees who struck on January 7, 1965, or by refusing to rehire the replaced employees after the strike was enjoined on February 2, 1965 (In re: Kellet Aircraft Corp., 3 Cir. 1950, 186 F.2d 197; Tampa Electric Co. v. Nashville Coal Co., D.C. Tenn. 1963, 214 F.Supp. 647; Corgin, Contracts, Sec. 1039, 1042).

The Plaintiff is entitled to recover from the Defendant International Union of Radio, Electrical & Machine Workers, AFL-CIO, the sum of $297,607.57, including $291,779.57 for unabsorbed fixed costs and excess variable costs resulting from the January 7-February 2, 1965, strike in breach of contract; $1,038.00 for damages experienced as the result of the work stoppage in breach of contract which occurred

on December 30, 1964; and $4,790.00 for legal expenses incurred in bringing the unlawful strike of January 7, 1965, to an end.

The Plaintiff is further entitled to have judgment for its costs and disbursements herein expended.

Let judgment be entered accordingly.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1369

Order on Petition for Rehearing

Before COLEMAN and SIMPSON, Circuit Judges and ESTES, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Supreme Court, U. S.
FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-735

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

vs.

DOW CHEMICAL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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Supreme Court
of the
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OCTOBER TERM, 1973

NO. 73-735

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

vs.

DOW CHEMICAL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, the Dow Chemical Company, respectfully prays that this Court decline to issue a Writ of Certiorari

to review the Decision of the United States Court of Appeals for the Fifth Circuit in Case No. 72-1369, styled Dow Chemical Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al, affirming a strike damage judgment of the United States District Court for the Middle District of Florida, Tampa Division, in favor of the Respondent.

OPINIONS BELOW, STATEMENT OF JURISDICTION AND STATUTES INVOLVED.

The Respondent concurs in the Petitioner's statements as to these matters.

QUESTIONS PRESENTED

The Respondent takes exception to the Petitioner's statement of its Question No. 1 under the heading of Questions Presented (P. 3).[1]

The question first stated under that number is:

> "Whether damages because of a 27-day strike in violation of a labor agreement may include *losses incurred before that strike commenced* as well as losses during the period of a concededly lawful 45-day strike after the expiration of the agreement?"

The Respondent will demonstrate, *infra*, that no damages were awarded to it for any losses incurred by it

[1]The abbreviation "P" is used herein to refer to the Petition; the abbreviation "A" is used to refer to the Appendix attached to the Petition.

prior to the time when the Petitioner's unlawful strike activity began, and that this is plain beyond argument from the District Court's opinion. The words italicized above therefore render the question as stated inappropriate for review, inasmuch as they make the ultimate question one that was never presented to or decided by the District Court or the Circuit Court of Appeals.

The question as alternatively stated under the first number is:

> "Alternatively, whether damages awarded *for the lawful strike* infringed on an area of labor combat that Congress specifically designed to be free and unobstructed?"

This is not a truly alternative statement of the question as first presented. The question as first presented refers to the fact, which is true, that the damages award includes losses, attributed to the unlawful strike, which were continuing to occur "during the period" of a lawful strike that commenced some weeks after the unlawful strike was terminated. But the question as alternatively presented subsumes a different fact, which is not true, *i.e.*, that damages were awarded "for the lawful strike."

The Respondent will demonstrate, *infra*, that the District Court did not award it any damages for, or occasioned by, the lawful strike and that this so so clear from the record as to preclude argument. Therefore, the alternative question, like the question as first stated, is one that is inappropriate for review because it is a question that was never considered or decided below.

By way of explanation, the District Court found that the amount awarded reasonably represented damages caused specifically by the unlawful strike of January 2-February 7, 1965, for which the Petitioner now admits liability; by an unlawful one day strike on December 30, 1964, for which the Petitioner also now admits liability; and included recovery of the Respondent's legal expenses incurred in bringing the strike of January 7, 1965, to an end (See A. 35a-36a). The parties agreed, and the District Court found, that the Respondent was not entitled to recover any damages resulting from the lawful strike of March 15, 1965, and the Court expressly eliminated such damages from the amount awarded, accepting the Respondent's evidence and calculations as to the relative operational and dollar impacts of the two strikes for that purpose (A. 25a-26a).

It is therefore most inaccurate for the Petitioner to assert by the content of its first question presented that either the District Court or the Circuit Court of Appeals held that damages resulting from a lawful labor strike are recoverable in an action to recover damages resulting from a prior unlawful strike, where the adverse effects of the unlawful strike are continuing to cause damages during the period of the ensuing lawful strike.

For the reasons set forth hereinabove, the Respondent respectfully submits that the Petitioner's questions presented for review are not expressed in the terms and circumstances of this case, as required by Rule 23(1)(c), Supreme Court Rules, and that the Petition should therefore be denied as to Question No. 1 without further consideration.

The Respondent does not take exception to the facts assumed in the Petitioner's subsidiary Questions Nos. 2 and 3, but submits that these questions merely present subsidiary aspects of the issue sought to be raised in Question No. 1, and that they do not warrant independent consideration.

COUNTERSTATEMENT OF THE CASE

The Petitioner's Statement Of The Case contains a substantial number of factual assertions which are at times inaccurate and at other times susceptible of being prejudicially misunderstood. The Respondent wishes to use its privilege of submitting a counterstatement for the purpose of inviting the Court's attention to these matters, after briefly describing the aspects of the case which are pertinent to this proceeding.

As the Petitioner states, this case arose when the Respondent sued the Petitioner for damages suffered on account of an unlawful labor strike occurring at the Respondent's Tampa, Florida, manufacturing plant from January 7, 1965, through February 2, 1965.[2] In the Circuit Court of Appeals, the Petitioner admitted the unlawful nature of this strike, and its liability for all damages attributable to it, for purposes of this litigation (A. 3a).

Relying upon the testimony of the Respondent's managerial operating personnel who were present in the plant before, during and after the occurrence of this unlawful strike; upon the testimony of a defense expert who agreed

[2]The Respondent also recovered damages for a one-day unlawful strike occurring on December 30, 1964, and for legal expenses incurred in enjoining the January strike, but these elements of damages are not in issue in this proceeding.

that the effects of a general labor strike must normally be expected to outlast the strike itself; upon the testimony of the Respondent's Comptroller; and upon corroborating documentary evidence contained in the plant's operating records, the District Court found that the Respondent continued to suffer damage from the unlawful strike at least throughout the first six months of 1965 (A. 23a-24a).

During this six-month period, referred to in the District Court's findings as the unlawful strike-affected period, on March 15, 1965, the Petitioner called a second and lawful strike against the Respondent.

Although this second, or lawful, strike continued until April 29, 1965, as indicated by the Petitioner, it continued for that length of time only in the sense that Union pickets continued to walk in front of the plant until April 29. The District Court found that this strike was in fact ineffective, due to a lack of support for it among plant employees, and due to a revised operating method that the Respondent utilized as the result of contingency planning that it was able to do during the negotiating period preceding the second strike (A. 25a-26a). The Petitioner in fact abandoned this second strike effort in April without securing any objective by it (A. 26a).

During the trial of this case, the Respondent introduced into evidence practically all of its operating records and statements for the years 1964 through 1966, and produced testimony by its operating personnel as to the comparative impact on operations, costs and revenues of the two strikes. The District Court found that the testimony and the records were mutually supportive (A. 26a). On the basis of this testimony and these records, the Respond-

ent's Comptroller prepared and introduced into evidence a calculation of damages attributable solely to the unlawful strike.

In making his calculation, the Comptroller first determined that the last six months of 1965 constituted a representative period of normal operations. He then used actual cost figures achieved by the plant during this period, and production and sales estimates made by qualified Dow personnel in the normal course of business, to calculate what the plant's costs and revenues would have been during the first six months of 1965 in the absence of any strike.

The Comptroller then arrived at an estimate as to the comparative impact of the second or lawful strike through consultation with plant operating personnel and operating records. On the basis of this information, he arrived at the conclusion that any adverse affect attributable to the lawful strike would be eliminated from the damages calculation if the figures representing production actually achieved during April and May were adjusted upward as if the plant had continued, during those months, to recover production capability at the rate previously established. This projection yielded a figure of 169,291 pounds to be added to actual production for the first six months to offset any effect attributable to the abortive legal strike, an amount which exceeded production actually achieved during any one of these months.

At this point, the Comptroller proceeded to split the adjusted costs figure for the strike-affected six month periods into fixed and variable costs. Then, using the fixed cost-per-pound figure achieved during a normal operating period, he calculated the amount by which fixed costs were

excessive during the first six months of 1965 due to the unlawful strike. This figure represented the amount of revenue that would have, in the absence of the unlawful strike, been available to help absorb fixed costs, but which was unavailable on account of that strike because of lowered production.

For the second element of his damages calculation, the Comptroller subtracted total fixed costs for the strike-affected period from total costs, to yield total variable costs. He divided this figure by the number of pounds produced to get the strike-affected variable cost per pound. He subtracted from this figure the variable cost per pound figure achieved during normal operations, to get the amount by which the variable cost per pound was excessive during the first six months of 1965 due to the unlawful strike. He then multiplied this figure by pounds produced during the first six months to get the total amount by which variable costs were excessive due to the unlawful strike.

The damages award consists of the sum of these two figures, representing variable costs to the extent rendered excessive by the January strike plus that part of fixed costs made unrecoverable by it.

The District Court found that all of the figures and projections used by the Comptroller in calculating damages were reasonable and supported by documentary evidence as well as by the testimony of operating personnel (A. 29a-30a), and the Circuit Court of Appeals was "extremely confident" that the trial court's conforming findings of fact were substantially supported by record evidence (A. 3a).

The Petitioner at trial offered no calculation of damages of its own beyond a calculation by an accountant who testified that he limited the strike-affected period to ten days, doing so arbitrarily and without interviewing any witnesses or reviewing the materials developed during discovery (A. 24a). Neither did the Petitioner offer any calculation as to the comparative effect of the legal strike.

The Respondent considers it appropriate at this point to invite the Court's attention to the defects in the Petitioner's Statement Of The Case referred to earlier.

In the second paragraph at page 4 of the Petition, the statement is made that the Respondent's plant lost money during every year prior to 1965. This is untrue. As the District Court's opinion confirms (A. 10a-12a), the plant was operating profitably during the first quarter of 1964, voluntarily went into a loss situation for the ensuing six months in order to accomplish an ambitious program of expansion, capital additions and retooling, and returned to profitability during the last quater of 1964. More specifically, the evidence was that the plant showed a profit of $48,387.00 for January-June, 1964; $5,800.00 for July-December, 1965; $48,429.00 for January-June, 1966; and still better profits for September and October of 1966.

In the same paragraph, the Petitioner states that there was a 12-month operating loss of $291,545 in 1965. As is apparent from the profit figure of $5,800.00 for the second half of that year, this loss occurred in its entirety during the strike-affected period.

The Petitioner's further statement in the same paragraph that Dow decided to close the plant in early 1966

because of the unprofitable nature of the business is deceptive. As the District Court's findings show (A. 8a), the plant was sold in 1968, not 1966. The testimony was that Dow made the *decision* to get out of the blown bottle business in 1966, but did not sell this plant until 1968. The testimony was, further, that "the business" as a whole, consisting of several plants around the country, was unprofitable, but that the Tampa plant was itself profitable.

In the first complete sentence at the top of page 5, and again on page 6, the Petitioner states that the damages award includes losses sustained during the first week of January, 1965, before the unlawful strike commenced. As is apparent from the District Court's opinion, and the explanation of the damages calculation given herein, this is not the fact. Damages were calculated by comparing actual operating figures for a given six-month period during which an unlawful strike occurred with a well supported projection of what those figures would have been in the absence of the unlawful strike. Thus, only damages attributable to the unlawful strike were claimed and awarded.

The Petitioner's statement at the same point that the damages award includes losses for the 45-day period of the lawful second strike should be qualified by the observation that damages were awarded only for the continuing effects of the prior unlawful strike, since the award includes an adjustment to offset the effect of the lawful strike.

In the first full paragraph on page 5, the Petitioner refers to the finding of the District Court (A. 25a),

affirmed on appeal, that the Respondent was forced to engage in a massive program of machinery repair in June of 1965 due to problems that had their genesis in the period just after the commencement of the unlawful strike when the Respondent was forced to subject the machinery to unusual stresses in order to train new employees and try to get production for its customers and was unable to apply proper maintenance.

Since this repair program practically brought the plant to a halt, and was attributable to the effects of the unlawful strike, the Court did not adjust the actual production figures for June on account of the legal March strike (A. 26a).

The District Court's finding as to the month of June was therefore not, as the Petitioner states, inconsistent with its making of allowances for prior months to offset the effects of the legal March strike.

The Petitioner's assertion (P. 6) that production costs and operating losses were at their worst during the period of the legal strike is simply inaccurate. The evidence showed that January and February were by far the worst months, with production then at 82,061 and 88,589 pounds as compared with 141,030 and 125,607 pounds for March and April. March was the second best, and May the best (146,102 lbs.) production month of the six.

The Petitioner's assertion that damages in the form of unrecovered fixed costs can be experienced only when an employer is receiving no return whatsoever from productive labor (P. 6, second paragraph, Item No. 4) is un-

tenable on its face. It is plain that a manufacturing operation suffers damage when the total fixed costs outlay remains constant and the number of units produced decreases due to an unlawful strike, regardless of how many hours per day the plant operates.

The Petitioner's statement (P. 6, next to last line) that the District Court made a ruling that the second strike was bound to have had a new impetus on damages is inaccurate. No such ruling appears in the District Court's opinion, and the statement relates merely to a passing thought expressed by the trial judge before the evidence relating to the comparative impacts of the two strikes was presented, including the evidence that supported the finding that the legal strike was abortive and ineffective.

The Petitioner's statement that the only evidentiary attempt to separate losses attributable to the two strikes was the submission of an exhibit summarizing operating margins for January, February and the first half of March (P. 7, first complete sentence) is also inaccurate. The District Court's opinion (A. 26a) shows clearly that Respondent's Comptroller submitted the calculation described in this brief, *supra*, for eliminating losses suffered on account of the legal strike from the amount of damages claimed, and that this calculation was based upon the direct testimony of Respondent's operating personnel who were present in the plant at all pertinent times and observed the impacts of the two strikes on operations at first hand, with this testimony being supported and corroborated by the plant's operating records and the Comptroller's financial records. This evidence was totally uncontradicted. The exhibit that the Petitioner refers to was an alternative

exhibit, submitted in case the District Court should find a shorter damages period than that for which Respondent contended.

The Petitioner's ensuing statement that the figure of $119,344 reflected by this exhibit was the amount of losses actually claimed for the January strike (P.7, first full paragraph) is a gross misrepresentation. As the opinions of the District Court (A. 23a-24a) and the Circuit Court of Appeals (3a) both show, the Respondent at all times claimed that the unlawful strike caused damages at least through the month of June, 1965.

The Petitioner's statement that the allowance for the March strike, as calculated by Respondent's Comptroller and accepted by the District Court, resulted in a reduction in the damages figure for excess production costs of only $246.00 is again untrue. The allowance resulted in the $246.00 reduction in the amount claimed for *variable* production costs made excessive by the unlawful strike. This is so because unit variable cost, by definition, does not decrease on account of increased production. As production increases, the total variable costs figure also increases because it takes aditional raw materials, labor, etc. to produce the additional units. Therefore, when the Comptroller projected that an additional 169,291 pounds would have been produced but for the legal strike, the damages figure reflecting excessive variable costs was not materially affected. However, this projection did materially affect the damages claimed for reduced ability to offset fixed costs due to lowered production as a result of the unlawful strike, reducing the amount claimed therefore by $30,438.52.

ARGUMENT

THE PETITION SHOULD NOT BE GRANTED BECAUSE IT IN ACTUALITY SEEKS MERELY TO DISPUTE FINDINGS OF FACT MADE BY THE DISTRICT COURT AND AFFIRMED BY THE CIRCUIT COURT OF APPEALS, AND DOES NOT SHOW THE EXISTENCE OF ANY CONFLICT AMONG THE CIRCUITS, UNSETTLED FEDERAL QUESTION, DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, OR OTHER SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD CONSIDER THE CASE.

The Respondent submits that a comparison of the Petitioner's Questions Presented with the opinions of the Courts below as referred to and discussed, *supra*, demonstrates quickly and clearly that the Petition amounts in sum to an effort to present to this Court a factual dispute thinly disguised as an unsettled question of federal law.

The Petitioner's argument proceeds upon the premise that the Courts below included damages caused by its legal strike of March 15, 1965, in their award of damages caused by the unlawful strike of January 7, 1965, despite the fact that the District Court explicitly found as a fact and the Circuit Court of Appeals explicitly affirmed the finding, that the amount awarded represented damages caused by, and only by, the unlawful January strike.

It is apparent that the Petitioner's real argument is that the District Court's separation of damages attribut-

able to the two strikes is factually wrong, for it is an undeniable certainty that the separation was made.

The question thus presented is not one of unsettled federal law, but one of fact.

The question phrased as "I." under "Reasons For Granting The Writ" in the Petition, *i.e.*, whether damages for an illegal strike "may encompass losses caused by a lawful strike period occurring" thereafter has never been an issue and is not now present in this case, inasmuch as the Respondent has never before advanced that contention and neither Court below has so held. The pre-trial stipulation in fact provided in part that damages attributable to the March strike would not be recoverable.

This Court has made it plain that the "special and important reasons" required by Rule 19 for the issuance of a writ of certiorari relate to problems beyond those which are merely episodic, and that its certiorari jurisdiction is reserved for those cases involving legal principles of importance to the public generally, as distinguished from cases which are of importance to the immediate parties only. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70.

The question whether the District Court properly separated damages attributable to the two strikes in this case would appear to be a classic example of a problem which is merely episodic and a quarrel which is of no importance to anyone but the parties.

SINCE THE PETITIONER DID NOT CAUSE THE RECORD BELOW TO BE TRANSMITTED TO THIS COURT, THE PETITION MUST REST UPON THE OPINIONS BELOW AS WRITTEN, AND THESE OPINIONS SHOW THAT THE ISSUES CLAIMED BY PETITIONER DO NOT EXIST.

Although the Petition contains numerous assertions of fact, many of which the Respondent flatly contradicts in its Counterstatement, *supra*, the Petitioner has not availed itself of its privilege, under Rule 21 of this Court's Rules, to have the record below certified and transmitted to this Court. None of the Petition's assertions is supported by a citation to any source other than the opinions of the Courts below.

This necessarily leaves the case in a posture where all contentions presented must be resolved by reference to the opinions of the District and Circuit Courts.

There is nothing in either of these opinions to show the existence in this case of any of the issues referred to in the Petitioner's Questions Presented or Reasons For Granting The Writ.

Whereas Petitioner's Question No. 1 suggests that the lower Courts included damages caused by a lawful strike, and antecedent losses, in an award for damages due to an unlawful strike, the opinion of the Circuit Court of Appeals expressly stated that the award, as affirmed by it, was based upon "reasonably anticipated sales as well as . . . fixed and variable production costs as adversely affected by the January strike, . . . " The District Court's

opinion precisely described the approved damages calculation, describing in detail the means by which all effects of the lawful strike were excluded from the damages award (A. 25a-26a), and finding terms that the amount awarded was only for damages caused by the unlawful strike.

In its Question No. 2, the Petitioner attempts to present a legal argument that damages in the form of excessive unrecovered fixed costs cannot occur when plant operations are occurring on a full-time basis, regardless or how badly crippled the plant may be, or what part of normal production may be lost. The Respondent has argued, *supra*, that this argument is unsupported by logic, in the Petition or otherwise. It is further true that no such issue was ever made or presented below, so that the question cannot be presented here. *Ellis v. Dixon*, 349 U.S. 458.

The Petitioner's Question No. 3 attempts to raise a question as to whether the evidence below was sufficient to support the District Court's apportionment of damages as between the lawful and the unlawful strikes. Apart from the argument that such a question presents no special or important reason for the exercise of certiorari jurisdiction, it is apparent that the Petitioner's contention that such a question is viable cannot be supported in the absence of the record below, since the Petitioner's underlying assertions are factual in nature and are controverted by the Respondent.

In any event, neither of the Courts below has held that the damages award could include any monies for damages attributable to the lawful strike. The question therefore amounts to an effort to have this Court determine whether a well-settled rule of damages was correctly

applied in a particular case, there being no dispute as to the law itself. Research reveals no instance in which this Court has exercised its certiorari jurisdiction to review such a routine question.

IF THE PETITION BE REGARDED AS RAISING AN ISSUE AS TO WHETHER A COURT MAY RELY UPON PROJECTIONS OR ESTIMATES, BASED UPON RELIABLE INFORMATION AS TO RELEVANT FACTORS, IN ASSESSING DAMAGES ATTRIBUTABLE TO AN UNLAWFUL STRIKE, THAT QUESTION HAS BEEN CLEARLY SETTLED BY THIS COURT, AND THE PETITION SHOWS NO CONFLICT OR DEPARTURE FROM THIS COURT'S HOLDING AMONG THE CIRCUITS.

Upon total reading, it appears that the thrust of the Petitioner's complaint to this Court is that the Courts below erred in failing to accept its argument that the mere calling of a lawful strike, when damages emanating from a prior unlawful strike are still occurring, must in all cases operate to truncate the injured party's otherwise continuing right to damages because of risk of uncertainty as to the true cause of ensuing damage. Apparently, the Petitioner would so argue regardless of whether the intervening strike were found to be one of moment, or, as the Courts below have found in this case, one that was abortive, ineffective and subsequently abandoned.

If this is the Petitioner's position, then the Petition must surely fail, in view of this Court's long-standing holding to the precise contrary in *Story Parchment Co. v.*

Patterson Paper Company, 282 U.S. 555. In this case, cited by the District Court in its opinion (A. 34a), this Court dealt with the position advanced here by the Petitioner in a few concise lines:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.
>
> * * *
>
> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be ascertained by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise (citing case). As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.
>
> * * *

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with the right of recovery."

The Circuit Courts of Appeal have uniformly applied the principles enunciated by this Court and quoted above in cases relating to strike damages. There is no conflict. See *International Brotherhood of Teamsters, etc., Local 25 v W. L. Mead, Inc.*, 230 F.2d 576 (1 Cir. 1956); *International Union of Operating Engineers, Local 653 v. Bay City Erection Co.*, 300 F.2d 270 (5 Cir. 1962); *Lewis v. Benedict Coal Corporation*, 259 F.2d 346 (6 Cir. 1958); *United Electrical Workers v. Oliver Corp.*, 205 F.2d 276 (8 Cir. 1953); and *United Steelworkers of America v. CCI Corporation*, 395 F.2d 529, (10 Cir. 1968), *cert. den.* 393 U.S. 1019. These are all cases in which strike damages judgments were based upon reasonable estimates arrived at from relevant factors.

The factors underlying the projections or estimates used in the present case were perhaps more strongly documented and reliable than in any of the cases just cited, including sales estimates based upon sophisticated market research and actual customer commitments, and production capabilities and normal costs drawn from factual experience.

None of the cases cited by the Petitioner addresses itself to the issue of sufficiency of means employed to separate lawful and unlawful damage.

International Brotherhood of Teamsters, Local 20 v. Morton, 377 U.S. 252, simply reversed a holding that certain secondary union activity which was lawful under federal law could be actionable for damages because of state law, vacating a damages judgment admittedly assessed on account of such conduct. The case presented no problem in the area of separating damages to a single operation simultaneously caused by lawful and unlawful activities and spoke not at all to the present question.

The holding that the Petitioner attributes to this Court in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 64, that all damage suits of all kinds in all circumstances against unions are expressly and totally prohibited is, of course, grossly in error. The Court there simply limited state court remedies for libels committed in the course of labor disputes to those circulated with malice and resulting damage. The case did not speak to any issue related to separation of damages.

The Petitioner does not elaborate upon its citation of *N.L.R.B. v. Insurance Agent's International Union*, 361 U.S. 477, 496, and research suggests no clue to its applicability. At the place cited, the Court, in a case relating to the statutory duty to bargain, was discussing permissible types of economic pressure.

The Petitioner's quotation from *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 732, would appear to be of little significance. The case had to do with legal picketing set against a background of illegal violence, and the Court merely stated that otherwise legal picketing may become so afflicted with violence as to render all damages

from it recoverable due inseparability, but that recovery would be limited to damages due to the illegal conduct when separable. The Courts below and the Respondent have not quarreled with either of those propositions.

THERE IS NO LEGAL SUPPORT FOR THE ILLOGICAL PROPOSITION THAT AN UNLAWFULLY STRUCK COMPANY CAN RECOVER NONE OF FIXED COSTS RENDERED UNRECOVERABLE BY THE UNLAWFUL STRIKE IF IT CONTINUES TO OPERATE FULL TIME.

In Part II of its Reasons For Granting The Writ, the Petitioner states that three Circuit Courts of Appeal and two District Courts have consistently adhered to the principle that the measure of unabsorbed fixed costs recoverable as damages in the case of an unlawful strike is the operating time that the employer loses and not the production that he loses.

This proposition will not answer to logical analysis. If an employer could have produced 100 units per month at a given fixed cost in the absence of a strike, and if he can only produce 50 units per month at the same fixed cost due to the strike, it is most obvious that he has been damaged in terms of inability to recover fixed costs by the strike, no matter how many hours he has to run per month in order to produce the 50 units under strike conditions.

Neither do any of the cases cited by Petitioner support its contention. Indeed, two of them appear to be adversely decisive of it. In *United Electrical Workers v. Oliver Corp.*,

supra, where an unlawful strike resulted in a loss of 52½ per cent of the plant's production as compared with a representative period, recovery of fixed costs was awarded based precisely on the percentage of production lost due to the strike, and not by any reference whatever to operating time. Although unclear, it appears that the plant operated full time during the strike.

In *Union Tank Car v. General Truck Drivers*, 305 F.Supp. 1162 (E.D. La. 1970), the company lost 31% of its production, again as compared with a representative period, during the time of an illegal slowdown. The company was awarded precisely 31% of its fixed costs for the slowdown period, although it was then operating the same number of hours, and with the same number of employees, as at other times. This case emphasized the logical fallacy of the Petitioner's position, since an employer could never recover any damages for a slowdown under Petitioner's theory.

The other cases cited by Petitioner appear to have no application at all. In *Sheet Metal Workers v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5 Cir. 1967), recovery of fixed costs was denied simply because the employer lost no business due to the strike, and therefore no income, and he was otherwise compensated in damages for extra expenses, such as overtime, occasioned by the illegal strike.

United Steelworkers of America v. CCI Corporation, *supra*, says nothing on the present issue. That case involved a refusal by a part of the plant's employees to cross a picket line, and unabsorbed fixed costs were recovered. The Court said nothing as to the measure of damages if all strikers had been replaced.

Finally, *Structural Steel & Ornamental Iron Ass'n v. Shopmen's Union*, 172 F.Supp. 354 (D.C.N.J. 1959), dealt with a strike which caused a total shutdown, and the opinion says nothing as to the measure of damages in other fact situations.

The Respondent submits that the Petitioner's contention is on its face insupportable, and that it is in fact totally unsupported by any authority.

CONCLUSION

Respondent prays that the Petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing brief have been served by air mail, postage prepaid, this 31st day of December, 1973, on the following:

Mr. Winn Newman
Mr. Irving Abramson
Mr. Melvin Warshaw
Attorneys for Petitioner

At the Common Address of:

1126 16th Street, N.W.
Washington, D.C. 20036

/s/ Jesse S. Hogg

ATTORNEY

SUPREME COURT, U. S.

JAN 14 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-735

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner,*

v.

DOW CHEMICAL COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Upon receipt of Respondent's brief in opposition which disputes various assertions of fact contained in the petition for certiorari the Court of Appeals for the Fifth Circuit was requested to certify and trans-

mit to this Court the two-volume appendix and supplementary appendix which comprised the record before it as well as the petition for rehearing which was denied on August 7, 1973.[1]

Respondent's brief in opposition is designed to create issues of fact that are non-existent and for the purpose of diverting the Court from the compelling legal issues presented by the writ. In addition Respondent would have this Court conclude that these issues were not presented below simply because there is no discussion or determination thereof in the underlying decisions.

Each of the three questions constituting the basis for the requested writ were repeatedly presented to the District and Circuit Court. A cursory examination of the Petition for Rehearing[2] will demonstrate that the awarding of strike damages for the period prior to commencement of the January strike (Pet. for Reh'g p. 2) as well as each of the three questions presented by the writ (Pet. for Reh'g pp. 2-4; 8-9) were specifically presented and argued on appeal from the District Court's decision. The failure of the lower courts to

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[1] The designation "R" followed by a number refers to said appendix or record below and the designation "Pet. for Reh'g" followed by a number refers to the rehearing petition denied by the Court of Appeals. The designation "Br." followed by a number refers to the brief in opposition and the designation "Pet." followed by a number refers to the petition herein for a writ of certiorari.

[2] The Petition for Rehearing (pp. 5-6) also called the Circuit Court's attention to the fact that its affirmance of the District Court's findings was the uncritical acceptance of Respondent's proposed findings that were Xeroxed and adopted verbatim by the District Court Judge and that it was therefore error to have applied the "clearly erroneous rule" in its review of the damage award.

consider or decide these important legal issues (Pet. pp. 3a; 25a-26a; 29a) cannot operate to deprive Petitioner from having them determined by this Court. The judicially unexplicated award of strike damages in this case may not camouflage the fact that their payment will infringe upon an area of labor combat that Congress specifically designed to be free and unobstructed, i.e., exculpating unions from the damage consequences of lawful strike activity. Sections 7 and 13 of the Labor-Management Relations Act establish an absolute right to engage in lawful strikes and the award of damages over a period of time that included such lawful strike activity can only be deemed judicial infringement thereof.

We shall now put to rest the claim that the statement of the case in the within petition for certiorari is either unsupported by the certified record below or in any other way inaccurate.

Respondent denies (Br. p. 3) that damages were awarded prior to the time when Petitioner's unlawful 27-day strike began on January 7, 1965, and at the same time concedes that damages were calculated and awarded by the District Court on a calendar or monthly basis which encompassed the entire first half of 1965 as the "unlawful strike-affected period" (Br. pp. 6-8). The damage award of $297,607 (Pet. 3a) is based upon Respondent's calculation set forth in its Exhibit 28 as Case III (R. p. 112; Pet. pp. 29a-30a) which included all of its excess production costs as well as its unabsorbed fixed costs for the month of January notwithstanding that the unlawful strike did not commence until January 7, 1965 (Pet. pp. 16a, 31a).

With respect to the Respondent's claim that the lower court expressly eliminated damages resulting from the 45-day lawful strike between March 15 and April 29, 1965 (Br. p. 4), Case III of the damage calculation (R. p. 112; Pet. pp. 29a-30a) shows that all losses (excess production costs and unabsorbed fixed costs) for the months of March and June were included. The so-called "adjustment" for the lawful 45-day is explained in Case III (R. p. 112) as increasing the amount of pounds produced during April and May by some 169,291. The spurious and illusory nature of this poundage adjustment, which amounts to about 25% of the total (687,109 pounds—see Case I, R. p. 109) actually produced over the entire 6-month period is that it reduced the amount ($161,431) of excess production cost awarded by $246 or less than 1%. (Case I, R. p. 109, on the basis of 687,109 pounds equals $161,676 of excess production costs and Case III, R. p. 112, on the basis of 856,400 pounds equals $161,431 of excess production costs.)

With respect to the claim that the 45-day lawful strike was ineffective because it failed to secure its collective bargaining objective (Br. p. 6) this assertion is not in accord with the record below which shows that this second strike most seriously affected plant operations (R. p. 237, pp. 241-242) and that it was not until July or later 1965 that the plant was able to get back to normal production (R. p. 221). Production costs as well as operating losses during the month of April reached a record all-time high (R. p. 138, Exhibit 19; pp. 138-142, Exhibits 19-21). Respondent's operating loss of $44,591 for the month of January increased in March to $53,129 and then reached $67,041 in April (R. p. 138, Exhibit 19). A comparison of the variable

costs and operating losses during the two strike periods shows:

1965	Variable Costs of Production (R. p. 142, Exhibit 21)	Operating Loss (R. p. 138, Exhibit 1a)
January	$.548 per pound	$44,591
March	$.597 per pound	$53,129
April	$.718 per pound	$67,041

Respondent operated with one-third less personnel because of the lawful strike (R. p. 90, Pet. p. 26a) and those who worked were new and inexperienced employees (Pet. p. 24a).

Independent of the damage impetus of the lawful second strike the supervening legal issue presented thereby is the combining of actionable and non-actionable strike losses so as to penalize the Union and the employees it represented because they exercised their federally protected and unqualified right to go out on strike after the labor agreement had expired. The requested writ specifically places before the Court the important legal issue of whether any damages whatsoever are recoverable for the period following the calling of the lawful 45-day strike on March 15, 1965.

Reason Two for granting the requested writ is whether damages for the 27-day (unlawful) strike may include all of Respondent's incurred overhead, i.e. fixed costs, for a period of 6 months even though Respondent operated its plant and realized a return from productive labor throughout this period. We agree with Respondent (Br. pp. 22-24) that an employer suffers overhead damage when the number of units decrease

because of a strike. However, Respondent failed to add—as has every court that previously considered this issue of damage (Pet. p. 11)—recoverable overhead must be that portion or percentage for which it recovers no return in productive labor (e.g., *United Electrical Workers* v. *Oliver Corp.*, 205 F. 2d 376, 387, 8th Cir., 1953). In this case the court below granted 100% of the fixed overhead expense during the month of January, the period of the unlawful 27-day strike, without regard to the amount of production (some 82,061 pounds, R. pp. 109, 112) that was obtained. In addition, the court below awarded 100% of the fixed overhead expense for the following 5 months even though there was no unlawful withholding of labor throughout that period and the plant continued to operate and produce income. The award of overhead expense for that 5-month period is not simply an error as to the measure of strike damage. It constitutes judicial infringement of the strike right exercised by the Union when it went out on a 45-day lawful strike following the expiration of the labor agreement.

The loss figures of $119,344 for the months of January, February and half of March 1965 appear in Exhibit 31 (R. p. 114) which Respondent prepared and introduced into evidence as "a calculation of damages attributable solely to the unlawful [first] strike." (Br. p. 7. If these losses are a "gross misrepresentation" (Br. pp. 12-13) then it is by Respondent who submitted Exhibit 31 to the District Court. We have shown that the purported adjustments in the damage calculation accepted by the court below (Pet. pp. 29a; R. p. 112, Case III of Exhibit 28) for the lawful 45-day strike were so minimal and irrationally conceived as to allow the Company to effectively recover damages for the

Union's total strike activity, i.e., for the periods of the unlawful first strike and the lawful second strike. Respondent's Exhibit 31 (R. p. 114) is therefore the only untainted statement of losses, as distinguished from proven losses (R. pp. 440, 469, 470), that is in evidence concerning the January strike.

Respondent's claims that the failure of the District Court to properly separate damages attributable to the two strikes is "a classic example of a problem which is merely episodic and a quarrel which is of no importance to anyone but the parties" (Br. p. 15). This claim, we submit, fails to recognize that the second strike was protected and authorized by Sections 7 and 13 of the Labor-Management Relations Act and that the legitimate use of the strike weapon cannot be subject to judicial interference since it can only operate to the detriment of the federal labor policy which recognizes that economic weapons by either an employer or union are an intrinsic part of our free collective bargaining system. To penalize instead of exculpating this or any other union from the damage consequences of a lawful strike can only be fundamentally destructive of that system and requires reversal of decision and judgment of the United States Court of Appeals.

Respectfully submitted,

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January 14, 1974